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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 49

BERNARD B. BAILEY, APPELLANT,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED MARCH 26, 1945

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IN CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

PETITION—Filed June 17, 1943

To the Honorable Walter T. McCarthy, Judge of the Circuit Court of Fairfax County, Virginia:

Your petitioner, J. A. Anderson, State Highway Commissioner of Virginia, files this his petition in accordance with an Act of the General Assembly passed at the 1942 session, and approved April 4th, 1942, Chapter 411, page 650 of the Acts of the Assembly of 1942, and such general laws as may be applicable for the purpose of condemning certain land in Fairfax County, Virginia, as hereinafter described, and alleges as follows:

. . . . . .

[fol. 5] 11. That a bona fide but ineffectual effort has been made by your petitioner to purchase the strips or parcels of land hereinafter described containing 3.98 acres, more or less, from the owners thereof but your petitioner has been unable to agree as to compensation and damages, if any, caused thereby.

[fol. 6] 12. That the said Bernard B. Bailey and Eunice R. Bailey, his wife, are the owners of the said tracts of land, containing 32 acres and 2 roods, 1 rood, 3.524 acres, and 2.931 acres, as hereinbefore set out, located in Dranesville Magisterial District, Fairfax County, Virginia, a part of which land is described in the above declaration marked Exhibit "A" embraced in the State Highway System and shown and described by lines on a blue print map of a portion of said road identified as Sheets Nos. 3 & 4, project 514-E, Route 7, on file in the offices of the Department of Highways at Richmond, Virginia, a copy of which is hereto attached, marked Exhibit "B", and prayed to be read as a part hereof.

. . . . . .

[fol. 7] 14. That the interests, rights and property intended to be taken by these proceedings is the fee simple

title to the said strips or parcels of land of the said defendants hereinabove described; that the said strips or parcels of land are necessary for the construction, alte-ra-
[fol. 8] tion, maintenance and repair of roads embraced in the State Highway System and for these purposes and for all purposes incidental thereto, known as Route 7 in Fairfax County, Virginia, and that it is requisite and suitable that the said strips or parcels of land through the land of the defendants be of the width and on the routes and grades as shown on said blue prints and plats.

15. Wherefore, your petitioner prays that Commissioners be appointed to ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for such uses and to award damages, if any, resulting to the adjacent or other property of the owners or the property of any other person, beyond the peculiar benefits that will accrue to such properties respectively from the construction and operation of the highway.

. . . . . .

[fol. 9] J. A. Anderson, State Highway Commissioner of Virginia. By (Signed) John W. Rust, Agent and Attorney for the State Highway Commissioner of Virginia.

[fols. 10-11] IN CIRCUIT COURT OF FAIRFAX COUNTY

PLEA DENYING AUTHORITY TO CONDEMN LAND—Filed July 9, 1943

Comes now the defendant, Bernard B. Bailey, and alleges that the petitioner has no authority to condemn the land described in the petition herein for the reasons particularly set forth in the petition filed in this Court on the 21st day of October, 1941, in Chancery cause No. 5762, styled Bernard B. Bailey vs. J. A. Anderson, State Highway Commissioner, which cause is now pending on appeal in the Supreme Court of Appeals of Virginia, Record No. 2708; that on October 16, 1941, the petitioner entered upon and took the land described in the petition herein pursuant to Sections 1969j (4) and 1969j (6), 1940 Supp.

to the Virginia (Michie) Code and, acting under said statute, filed with the Clerk of this Court a certificate of deposit of a sum of money representing the petitioner's estimate of the amount of compensation to be paid the defendant; that said statute is unconstitutional for the reasons particularly set forth in the petition filed in said Chancery cause No. 5762; and that the question of the validity of said statute is now pending on appeal in the Supreme Court of Appeals of Virginia, Record No. 2708; and defendant alleges further that no final decree has been entered by the Supreme Court of Appeals of Virginia in said Record No. 2708.

(Signed) Bernard B. Bailey.

[fol. 12] IN CIRCUIT COURT OF FAIRFAX COUNTY

PLEA DENYING AUTHORITY TO CONDEMN LAND—Filed March 16, 1944

* * * * * * * *

Comes now the defendant Bernard B. Bailey, and alleges that the petitioner has no authority to condemn the land described in the petition herein for the reasons particularly set forth in the petition filed in this Court on the 21st day of October, 1941, in Chancery cause No. 5762, styled Bernard B. Bailey v. J. A. Anderson, State Highway Commissioner; that on October 16, 1941, the petitioner entered upon and took the land described in the petition herein pursuant to Sections 1969j (4) and 1969j (6). 1940 Supp. to the Virginia (Michie's) Code and, acting under said statute, filed with the Clerk of this Court a certificate of deposit of a sum of money representing the petitioner's estimate of the amount of compensation to be paid the defendant; that said statute is unconstitutional for the reasons particularly set forth in the petition filed in said Chancery cause No. 5762; that an appeal in said Chancery cause No. 5762 was granted by the Supreme Court of Appeals of Virginia (Record No. 2708), and a judgment was entered on December 6, 1943; that a petition for rehearing was denied by order of the Court entered on January 25, 1944; that a transcript of the record in said cause has been printed and filed with the Clerk of the Supreme Court of

the United States; that as soon as the petition for certiorari and supporting brief can be printed, which is expected within a short time, the same will be filed with the Clerk of said Court, seeking a review by the Supreme Court [fols. 13-14] of said judgment, and a reversal thereof, on the ground that the State Highway Commissioner of Virginia has no authority to condemn the land in question and thereby destroy unnecessarily the operation of the petitioner's mill and that, in allowing such condemnation, the petitioner has been subjected to an unconstitutional discrimination, and on the further ground that said statute under which the Commissioner seized and mutilated the land is unconstitutional.

(Signed) Bernard B. Bailey.

[fol. 15] In Circuit Court of Fairfax County

Order Denying Motion for Stay

After hearing counsel on defendant's oral motion made on March 31, 1944, for an order staying this condemnation proceeding until final action has been taken by the Supreme Court of the United States on the petition for writ of certiorari (No. 829) to review the judgment of the Supreme Court of Appeals of Virginia entered in the case of Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914, it is ordered that said motion be and the same is hereby denied.

(Signed) Paul E. Brown, Judge.

Dated this 6th day of April, 1944.

[fol. 16] In Circuit Court of Fairfax County

Plea Setting up Claim for Damages etc.—Filed April 22, 1944

Comes now the defendant, Bernard B. Bailey, and alleges:

1. As compensation for the 3.98 acres of land more or less described in the petition herein, the defendant claims

the sum of $350.00 an acre for the bottom land and the sum of $3,000.00 for the hill land from which the earth was taken for the construction of the fill on the bottom land.

2. As damages to the residue of the defendant's property from the construction of the highway, he claims the sum of $21,100.00, which represents the difference between the sum of $33,600.00 being the fair market value of the whole property, including land, dwellings, mill, barns and other buildings, and the sum of $12,500.00 being the fair market value of the residue after the construction of the highway.

3. The defendant claims interest at the lawful rate on the total amount awarded as compensation and damages from October 15, 1941, when the property herein was seized by the petitioner, until payment is made.

4. In addition to the foregoing, the defendant claims compensation for the use of the land described in the petition for highway purposes at the rate of $200.00 per month for each and every month the land has been and will be used for highway purposes from October 15, 1941, when the land was seized, until such date as the petitioner is enjoined from using the land prior to acquiring title thereto in a [fol. 17] legal manner. The basis for this claim is hereinafter set forth.

5. Acting under the authority contained in Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6), the petitioner on October 15, 1941, seized the land described in the petition and since that time has constructed a state highway thereon and has used the same for the travel of the public, which use is now being made of the land. The defendant avers and charges that said statute is in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States because it allows the Petitioner to enter and construct the highway and mutilate and disfigure the property for highway purposes and at the same time restrains the owner from acting upon his own motion and from compelling the petitioner to act to have commissioners appointed to view the land before the mutilation and disfigurement are completed.

6. The defendant avers that he is entitled to attack and hereby expressly claims the right to attack said statute as

being in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States because he has been damaged by the operation of the unconstitutional feature of the statute in that from October 15, 1941, when the petitioner seized the property, until June 17, 1943, when the petitioner filed the petition herein, the petitioner was restrained by said statute from applying to the Court and from compelling the petitioner to apply to the court for the appointment of commissioners to go [fol. 18] on the property and view the entire property, including the part taken and the residue, to determine the value of the entire property in its condition before it was mutilated and disfigured beyond recognition; and during said period of time the petitioner so changed and disfigured the property, as hereinafter set forth in detail, as to make it impossible, when the petition was filed herein and at the present time, for commissioners appointed by the court pursuant to the statute regulating the method of determining just compensation, to go on the property and determine the value of the entire property as it existed before the petitioner changed and disfigured it; and since the damages to the residue of the property resulting from the highway construction is the difference between the fair market value of the property at the time the entry was made and the fair market value of the property after the construction of the highway it is impossible now and was impossible on June 17, 1943, when the petition herein was filed, to obtain a fair and just appraisal of the damages to which the defendant is entitled.

7. On the residue of the defendant's property, which is approximately fifteen miles from Washington, D. C., there stands a brick colonial dwelling erected in the early part of the 19th century, which, with the frame additions thereto, consists of ten rooms and bath, large attic and basement, large fire places, antique mantels, ornamental cupboards, center hall and colonial stairway, all of which on October 15, 1941, had been restored, renovated and redecorated at a cost of several thousand dollars. The dwelling stands on a ridge, on one side of which is a four-story brick, water-power grist mill erected in the year 1794. In keeping with [fol. 19] the character of the dwelling and forming the principal part of the value of the property as a colonial estate, the grounds adjacent to the dwelling and mill race consisted of ten acres of rich meadow and sod land, which

on October 15, 1941, had been placed in excellent condition after several years of mowing and other care. Without these spacious grounds the property loses its distinctive character as a colonial estate. In addition to this outlay, and approximately 200 yards from the dwelling, the property contained three acres more or less of hill land, partly covered by oaks and other timber, at the foot of which ran the mill race in a winding course to the mill wheel. From this hillside could be seen the surrounding country for miles around, which gave to this part of the property its distinctive value as a site for the erection of another dwelling with grounds sloping off to the mill race and overlooking the ten acres of meadow land and the historic mill and water fall in the distance.

8. From October 15, 1941, until on or about September 15, 1942, the petitioner with steam shovels and other equipment, fleets of trucks and numerous gangs of convicts, excavated thousands of yards of dirt from said hill land adjacent to the mill race and carried the dirt to the meadow land and there constructed a fill for a state highway. The excavations in the hill land were made to a depth of approximately fifty feet and in a width of approximately 150 feet leaving a ghastly and extremely dangerous chasm for a distance of approximately 400 feet through the hill, the like of which it is said by highway officials is not to be [fol. 20] found in the Commonwealth of Virginia outside of the mountains. The fill constructed for the highway runs through the meadow land, which formed the grounds aforesaid, for a distance of approximately 1000 feet and rises to a maximum height of between 20 and 30 feet and has a width of approximately 125 feet at the base. The fill forms an enormous wall of dirt and rocks which runs through the spacious grounds parallel to the colonial dwelling and within 150 feet of the dwelling, and completely wipes out the immediate grounds which formed the setting for the colonial estate and constitutes a barrier isolating the dwelling and obstructing the expansive view therefrom. Deposits of dirt, muck and mud, washed from the banks of the fill, have spread out and cover the sod land close to the dwelling. The chasm through the hill land has completely wiped out the site which formed the grounds for a dwelling overlooking the surrounding country for miles around. All of these conditions existed on June 17, 1943, when the petition herein was filed, and also exist now.

9. Because of this mutilation and disfigurement of the property, it is now impossible for commissioners appointed by the court to go on the property and visualize the condition and value of the property before the disfigurement.

10. Defendant avers that to deny him compensation for the use already made of his property for highway purposes and to allow the petitioner to continue to use the property for such purposes before acquiring title thereto, which use is based entirely upon said unconstitutional statute, would operate to deprive the defendant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

use operates to deprive the defendant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

(Signed) Bernard B. Bailey.

[fol. 27] IN CIRCUIT COURT OF FAIRFAX COUNTY

MOTION TO STRIKE PLEADING—Filed May 12, 1944

Now comes the Petitioner, J. A. Anderson, State Highway Commissioner of Virginia, by his agent and attorney, John W. Rust, and moves this honorable Court to strike the pleading filed in this cause by Bernard B. Bailey on the 22nd day of April, 1944, and thereupon says as follows:

1. That your Petitioner is unable to ascertain the nature of said pleading, and is unable to determine whether the same is a petition or an attempt to set up the grounds of defense of the Defendant, Bernard B. Bailey, as required under Section 1969j(2), of the 1942 Code of Virginia.

2. If the same is intended as grounds of defense, your Petitioner requests that all of the immaterial allegations of the said pleading which are not germane to the issues

in a condemnation proceeding, be stricken from the said pleading.

3. If the same is not filed by Bernard B. Bailey as grounds of defense, then your Petitioner requests that the entire pleading be stricken from the record, and the proper grounds of defense be filed, in accordance with the said Section of the Code.

4. That under heading 3 of the pleading of Bernard B. Bailey, interest at the lawful rate on the total amount awarded as compensation and damage from October 15, 1941, when the property was taken for highway purposes, until payment is made, is claimed. Your Petitioner con- [fol. 28] cedes that in the normal case when property is taken for a public purpose before compensation is paid, the landowner is entitled to interest from the date of the actual taking in order that the compensation paid to the landowner would be the equivalent of payment made at the time of the taking. Your petitioner states, however, that in this case a substantial part of the delay in the payment of compensation has been the result of the action of Bernard B. Bailey in insisting that the condemnation proceedings be delayed until the termination of the injunction suit filed by the said Bernard B. Bailey against J. A. Anderson, State Highway Commissioner, which suit was decided adversely to the claim of the said Bernard B. Bailey by the Supreme Court of Appeals of Virginia. See Bailey v. Anderson, 182 Va. 70. Your Petitioner, therefore, says that Bernard B. Bailey is not entitled to any interest for such portion of the delay which has been the result of his own actions, and it is therefore moved that so much of paragraph 3 of said pleading of Bernard B. Bailey which claims interest for such period which resulted from the delay caused by Bernard B. Bailey, be stricken from said pleading and record.

5. That your Petitioner moves that paragraph 4 of the pleading of Bernard B. Bailey be stricken from the said pleading and record. The land of Bernard B. Bailey was taken for a public use when the State Highway Commissioner first took possession of said land. The landowner is entitled to just compensation for the land taken and damages done. Upon the payment of such compensation and interest set out in paragraph 4 of this Motion so that the landowner would be receiving the equivalent of the payment [fol. 29] of just compensation made at the time of the tak-

ing, the landowner will have been paid all compensation to which he is entitled. He is not entitled also to additional compensation for the "use" of the land.

6. Your Petitioner further requests that paragraphs 5 and 6 be stricken from the pleading and record, because of the fact that the constitutionality of Sections 1969j(4) and 1969j(6) are not before the Court in this condemnation proceeding, by reason of the fact that in the suit of Bailey vs. Anderson, 182 Va. 70, the Supreme Court of Appeals of Virginia upheld the constitutionality of the aforesaid Sections, insofar as they affect this proceeding, and, therefore, these paragraphs should be stricken from the pleading and record.

7. Your Petitioner requests that all immaterial matter not germane to the issues involved under paragraph 7 of the pleading of Bernard B. Bailey be stricken from the said pleading and record, and that he be confined to alleging what would be just compensation for the land or other property or for the interest or estate therein proposed to be condemned for highway purposes, and to be awarded damages, if any, resulting to the adjacent or other property of any other person from the construction and operation of the highway, and your Petitioner wishes to state that the allegations contained in this paragraph are rambling and immaterial, and not confined to the issues involved.

8. Your Petitioner objects most strenuously to the allegations and averments of paragraph 8 of the pleading of Bernard B. Bailey that the work upon the highway was carried out by numerous gangs of convicts, as it is immate-
[fols. 30-31] rial as to who performed the labor for this project, and this statement is evidently intended to create a false impression in the minds of the Commissioners and the Court, and it is requested that these statements be stricken from the pleading and record.

9. It is requested that paragraph 9 of the pleading of Bernard B. Bailey be stricken from the pleading and record, because of the fact that it is evident that the Commissioners appointed by the Court can go upon the property and visualize the conditions and value of the property and award just compensation to the said Bernard B. Bailey, in accordance with the statute, and this statement is misleading and calculated to prejudice the Commissioners and the Court.

10. Your Petitioner also asks that paragraph 10 of the pleading of Bernard B. Bailey be stricken from the said pleading and record, because of the fact that it is again alleged in that paragraph that the statute is unconstitutional, which question has already been decided by the Supreme Court of Appeals of Virginia in the said case of Bailey v. Anderson, 132 Va. 70.

* * * * * * * * *

15. Your Petitioner moves that that portion of paragraph 18 of the pleading of Bernard B. Bailey requesting a decree enjoining the Petitioner from using the land until title has been acquired, be stricken from said pleading and the record in this case because this presents a question already litigated and decided adversely to the claims of Bernard B. Bailey in the case of Bailey v. Anderson, supra, and also because the question of the constitutionality of the statutes attacked is not an issue in this case.

[fol. 33] 16. Your Petitioner further states that the only question at issue in this condemnation proceeding is the amount of damages and compensation to which the said Bernard B. Bailey is entitled, by reason of the construction and operation of the said highway, and he requests that the pleadings and proof be limited to this question alone, and that all of the immaterial and improper statements set out in the said pleading of Bernard B. Bailey be stricken from the record, and that the said entire pleading should be stricken from the record and the Defendant be required to file his grounds of defense, devoid of the immaterial and prejudicial material contained in the said pleading of the said Bernard B. Bailey, as it is believed that the pleading, as now drafted, with the allegations of convict labor, incompetent highway engineers, and other such allegations, will prejudice the Commissioners, and that the Defendant should be required to file his grounds of defense and confine his pleadings strictly to the issues involved.

J. A. Anderson, State Highway Commissioner of Virginia. By (Signed) John W. Rust, Agent and Attorney.

[fol. 34] IN CIRCUIT COURT OF FAIRFAX COUNTY

ORDER APPOINTING COMMISSIONERS—June 9, 1944

It appearing to the Court that the said J. A. Anderson, State Highway Commissioner, has duly filed his petition in the said Court, seeking to condemn the fee simple title to certain land described in the said petition and belonging to the said Bernard B. Bailey, and that due notice was given to all of the Defendants, and that the said Petitioner did on the 19th day of July, 1943, apply to the Judge of the Circuit Court of Fairfax County, Virginia, for the appointment of Commissioners in this cause;

And it further appearing to the Court that this cause was continued at that time, and that on the 22nd day of April, 1944, the Defendant, Bernard B. Bailey, filed a pleading in this cause, and the State Highway Commissioner filed a motion to strike the pleading of said Bernard B. Bailey, which motion was heard on this the 9th day of June, 1944, and the Court being of the opinion that the motion to strike the said pleading of the said Bernard B. Bailey should be overruled, and the said motion is overruled by the Court, subject to the exceptions as hereinafter set out, to which ruling the Plaintiff excepts;

And the Court is of the further opinion that the Statutes of the State of Virginia, under which this proceeding was instituted and the land of the Defendant was taken are not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, and the Court so [fol. 35] holds, to which ruling of the Court the Defendant, Bernard B. Bailey, excepts.

And the Court also being of the opinion that Paragraph No. 4 of the pleadings of Bernard B. Bailey which claims compensation for the use of the land in the sum of $200.00 per month is not a valid claim, and the Court doth order that this paragraph be stricken from the pleading of the said Bernard B. Bailey, to which ruling of the Court the Defendant, Bernard B. Bailey, excepts.

And the Court further rules that the pleading of the said Bernard B. Bailey shall be considered as his grounds of defense.

And the Court doth adjudge, order and decree that the Clerk of the said Court shall summons Robert D. Graham, Buford M. Bridwell, Harry B. Mitchell, Oswald V. Carper,

J. C. Hoskins, Carroll V. Shreve and John F. Bethune, seven disinterested freeholders, who shall be residents of the County of Fairfax, wherein the land is situated, from which seven after the exercise of one peremptory challenge by each the petitioner and the landholder, the remaining five, any three of whom may act, whose duty it shall be to go upon and view said land at 10:00 o'clock, on the 11th day of July, 1944, and ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for highway uses, and to award damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person, from the construction and operation of said highway, as described in said petition.

The Court doth further adjudge, order and decree that the Commissioners in the custody of the Sheriff of the [fol. 36] County, shall view the land described in said petition with the landowner and the attorneys of record for the land owner, the agent and attorney for the State Highway Commissioner, and a representative of the State Department of Highways.

Enter:

(Signed) Paul E. Brown, Judge.

[fols. 37-38] In Circuit Court of Fairfax County.

Oath of Commissioners—Filed July 11, 1944

I, W. Franklin Gooding, Deputy Clerk of the Circuit Court of Fairfax County, Virginia, do hereby certify that Buford M. Bridwell, Harry B. Mitchell, J. C. Hoskins, Carroll V. Shreve and John F. Bethune, have this day made oath before me in my Office that they will faithfully and impartially ascertain what will be a just compensation for the land or other property of the defendants, or for the interest or estate therein, proposed to be condemned for highway uses, and to award the damages, if any, resulting to the adjacent or other property of the owner, or owners, or to the property of any other person, from the construc-

tion and operation of said highway as fully described in the petition filed in this matter.

Given under my hand this the 11th day of July, 1944.

(Signed) W. Franklin Gooding, Deputy Clerk of the Circuit Court of Fairfax County, Virginia.

[fol. 39] IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

J. A. ANDERSON, State Highway Commissioner of Virginia, Petitioner

v.

BERNARD B. BAILEY and EUNICE R. BAILEY, His Wife, et al., Defendants

Statement of Evidence

Fairfax, Virginia, Tuesday, July 11, 1944.

The above-entitled cause came on for hearing at 10:30 o'clock a. m. in the Court House, Fairfax, Virginia, before the Honorable Paul E. Brown, Judge of the Circuit Court of Fairfax County, Virginia, and the following Commissioners:

Buford M. Bridwell, Harry B. Mitchell, J. C. Hoskins, Carroll B. Shreve, John F. Bethune.

APPEARANCES:

J. W. Rust, Esq., counsel for the Petitioner; Frank Ball, Esq., counsel for the Defendants.

[fols. 40-127] Proceedings

(The Commissioners and all persons expecting to appear as witnesses were duly sworn.)

The Court: Let the record show that the names of Robert D. Graham and Oswald B. Carper were stricken from the original list.

The Sheriff will take you folks over to the property in question. You and Senator Rust are going, I suppose?

Mr. Ball: Yes.

Mr. Rust: We have an order entered for Mr. Smith to go.

The Court: We will recess, then, until 2:30.

(Thereupon, at 10:50 o'clock a. m. the hearing was recessed, to reconvene at 2:30 o'clock p. m. of the same day.)

[fol. 128] T. N. Ross, was called as a witness by counsel for the Petitioner and, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rust:

Q. Mr. Ross, tell the Commissioners your name.

A. T. W. Ross.

Q. What is your occupation?

A. Securing land for right of way road purposes.

Q. How long have you been with the Highway Department?

A. Twenty-one years.

Q. What section of the State do you cover in your operations?

A. Thirteen counties surrounding Culpeper, which includes Fairfax and Arlington.

Q. What is your principal business in reference to rights of way?

A. Well, my principal work is securing the land.

Q. Did you make any effort to secure the land from Mr. Bailey?

A. Yes, sir.

Q. What effort did you make to secure it?

Mr. Ball: Is it necessary to prove that?

Mr. Rust: We are supposed to make an effort to compromise before we file a condemnation proceeding.

The Court: You have to allege it and have to prove it.

[fol. 129] A. We made Mr. Bailey an offer.

Q. Did Mr. Bailey accept your offer?

A. No, sir.

Q. Did you make every effort you could to settle with him without going into a condemnation proceeding?

A. I thought so at the time.

Q. Have you been in any way able to make a settlement with Mr. Bailey?

A. No, sir.

Q. Was it therefore necessary for the condemnation proceeding to be filed, in order to settle this matter?

A. Yes, sir.

Q. That is the only way you could settle it after you failed to reach an agreement with Mr. Bailey?

A. Yes, sir.

Q. Your business is to purchase land from the land owners for the Highway Department, is that correct?

A. Yes, sir.

Q. And you purchased all of the rights of way along Route No. 7 on which this mill is located?

A. Yes, either directly or indirectly. I mean, I had help. I didn't purchase each and every property. In fact, I didn't purchase but very little of it personally.

Q. What land right near Mr. Bailey's did you purchase?

Mr. Ball: I object to that, if your Honor please. It has [fol. 130] been held over and over again that you can not consider what has been paid by the Government for land for the same project.

The Court: I think that is objectionable. I sustain the objection.

Mr: Rust: We would like to except to that.

By Mr. Rust:

Q. What damage do you think you caused Mr. Bailey, Mr. Ross, in constructing this road?

A. Do you mean in dollars and cents?

Q. Well, just what did you do there?

A. Well, we divided the property and we have a rather high fill across the bottom, and an exceptionally high cut through the high land. I think the property is damaged about 3,000, which is $1,000 more than I thought before I saw the work done. In other words, I think now that the property is damaged more than I anticipated it would be damaged.

Q. You think that is about the damage that has been caused?

A. I do, yes, sir. That is, by selling the property—its market value prior to taking and market value after taking.

Q. Did you go near any of his buildings, Mr. Ross?

A. Yes, I have been near all of the buildings. I haven't been in any of the buildings.

Q. In constructing the road, what buildings did you approach?

A. Well, I was up to Mr. Bailey's house.

[fols. 131-137] The Court: What Senator Rust meant, I think, is, did you go near the buildings with your road?

The Witness: Is that what you meant?

By Mr. Rust:

Q. Yes, that is what I am asking you.

A. Why, yes. We went back of the main dwelling, back of the old mill, and in front of the small bungalow on top of the hill.

. . . . . .

[fol. 138] Q. How deep is that cut?

A. I don't know the exact figures. It is a pretty deep cut.

Q. You don't know how high the fill is?

A. I don't know offhand, no.

Q. That is an unusually deep cut for eastern Virginia, or anywhere outside of the mountains, is it not?

A. Yes, sir.

Q. You stated to the Commissioners that you had tried to settle the case?

A. Yes, sir.

Q. At that time you thought the damages were considerably less than you are satisfied they are now, is that right?

A. I thought they were less, yes, sir.

Q. And you offered considerably less?

A. I offered less.

[fol. 139] Q. And Mr. Bailey told you his damages would be greater?

A. Yes, sir.

Q. And he was right?

A. I don't think he was damaged what he told me he would be.

Q. I do not ask you to concede that. Is it not a fact that you have jumped the amount of damage fifty per cent?

A. No, sir.

Q. Was it not $2,000 that you offered at that time?

A. Yes, sir.

Q. And now it is $3,000?

A. Yes, sir.

Q. That is just one-half of the $2,000 increase?

A. Yes, sir, but if he had offered to accept $3,000 I think we would have settled and we wouldn't have been here.

Q. Why did you not offer what you thought was right?

A. That was my honest opinion, and I am just as honest now in admitting that I was wrong. I think I was wrong.

Q. What was the value of the land taken before it was taken?

A. I valued it at $200 an acre, Senator.

Q. $800 for the land taken?

A. Whatever it would amount to.

Q. And you fixed $3,000 damage?

A. Yes. That included the land.

Q. Does that include the land?

A. Yes.

[fol. 140] Q. $2,200 is what you estimate the damage, and $800 for the land taken?

A. That is right.

Q. Can you tell us what you took into consideration in arriving at the damage?

A. Yes, sir; I think so.

Q. How did you arrive at that? I do not mean the exact dollars and cents calculation. What elements did you take into consideration?

A. Of course I realize that any property and all property in that vicinity has increased in value, but that would have nothing to do with the damage. The damage would be the same. But I think that that property sold in two parcels would bring within $3,000 of what the entire property would have brought any way you sold it, whether in one piece, two pieces, or any way you sold it. I think the property on the south or west side of the road, where the bungalow is, has been enhanced in value. I really, truly do.

Q. You think the low land has been enhanced?

A. I mean the higher property. I don't think you could do anything to help that low land—or hurt it much, either.

Q. You think the high land is enhanced by having a deep cut through it?

A. I think by reason of being able to divide it into two parcels. If you had to sell it all to one man I would say it would be an entirely different story.

[fols. 141-149] Q. How wide is the cut from the top of one side to the top of the other side?

A. A look at the prints will tell you.

Q. Did you not cut out the very finest building site that was up there?

A. I would assume they put the house on the finest. They had an opportunity to.

Q. You mean that little house?

A. Yes, sir.

Q. You did not think that that was the permanent building that was going to be put there?

A. That seemed to be somebody's choice. It probably would not have been mine, but it was somebody's.

. . . . . .

[fol. 150] IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

Fairfax, Virginia,
Wednesday, July 12, 1944.

Hearing in the above-entitled cause was resumed at 9:30 o'clock a. m.

Appearances: As heretofore noted.

PROCEEDINGS

The Court: Do you have some more witnesses?

Mr. Rust: We have only Mr. Smith.

Mr. Ball: Before he goes on, could we talk to your Honor a moment? We may be able to shorten this a bit.

(There ensued a conference in the Judge's chambers between counsel for both parties and the Court.)

The Court: Do you want to announce the stipulation now?

Mr. Rust: I think we had better do it now. I think Mr. [fol. 151] Bailey has it.

STIPULATION RE STOPPAGE OF OPERATION OF MILL

The Court: Gentlemen, one of the elements of damage in this case is the stoppage of the operation of the mill by the building of this fill. It became necessary to take the mill race underneath the highway through this 48-inch pipe which you saw, and then to take the tail race down alongside of the right of way to the original ditch, and there take it under the highway fill. One of the claims is that these pipes going underneath that fill would clog up and prevent the operation of the mill.

Counsel for both sides here have agreed on this provision, which you can incorporate in your findings when you go to assess the damages, if any, and this will be in addi-

tion to any damages that you might find. The stipulation is as follows:

It is stipulated and agreed that the State Highway Department will keep the pipes on this new highway, and also the tail race, where located upon the State right of way, free from dirt or other obstruction so as not to affect the operation of the mill, and so as not to prevent the normal flow of water to the mill and through the tail race.

It is further understood and agreed that the stipulation and agreement relates to the period and time that the mill will be operated.

On account of the above agreement and understanding, the Commissioners, in arriving at their award, may not take into consideration any damages accruing to the mill [fol. 152] and its operation by reason of the construction of the new highway, and the Commissioners, in making their report, shall give full force and effect to this stipulation and agreement.

In other words, you will disregard anything about the mill race or tail race as it affects the operation of the mill. You may have this when you draw up your report.

W. Frank Smith was called as a witness by counsel for the Petitioner and, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Rust:

Q. Tell the jury your name.

A. W. Frank Smith.

Q. What position do you occupy with the Highway Department?

A. Resident Engineer, in Fairfax County.

Q. What are your duties as Resident Engineer?

A. Supervision and maintenance and construction of highways, including Fairfax County.

Q. Did you supervise the construction of this road through the property of Mr. Bailey?

A. Yes, sir.

Q. When was that road built there, Mr. Smith?

[fols. 153-159] A. In 1941-42.

Q. Will you give us the distance of the entire new road through Mr. Bailey's property?

A. 1414 feet.

Q. Will you tell us how high the fill is on through the bottom?

A. Its maximum point is 23 feet.

The Court: How much?

The Witness: Twenty-three feet.

Q. And what is the maximum depth of the cut?

A. It is 37 feet.

. . . . . .

[fol. 160] Q. Now, with regard to that cut, how wide is that cut at the top? Did you look that up?

A. Yes, sir. I have checked that. The cut is 127 feet across the top.

Q. And 37 feet deep?

A. Yes, sir.

Q. And about how many cubic yards of dirt did you take out of there, approximately?

A. You mean from Mr. Bailey's property? We only got half of the cut from his property.

Q. What?

A. Only half of that cut is from his property. His property line is right on top of the hill.

Q. Well now, is not his property line a little over the crest of the hill?

A. Very, very little.

Q. Is not that cottage up on the crest of the hill, in fact a little bit over the crest?

A. That, I would say, was right on the crest.

Q. And his line is west of the cottage, is it not?

A. Just immediately west, that side fence line.

[fols. 161-162] Q. And is not the deepest part of the cut on his place?

A. I would say it was, by a distance of fifteen or so feet from the peak.

Q. How many cubic yards would you say came out of his property, as nearly as you can guess?

A. I have estimated that at about twenty to twenty-two thousand cubic yards, from Mr. Bailey's section of the cut.

Q. Could you tell us for what purpose you used that? Was that for the fill?

A. To make part of the fill.

. . . . . .

[fols. 163-167] Q. Did you give the length of that fill, by the way, across there?

A. No.

Q. Do you have the length of it there?

A. I can take it right off.

Q. Would it be too much trouble?

A. Not a bit.

Q. You gave us the entire length.

A. The entire length, yes. That is, on Mr. Bailey's property?

Q. Yes.

A. It is 1100 feet.

Q. And what is the elevation at the lower end? Do you have that available?

A. Yes, sir; six feet.

Q. In other words, it runs from twenty-three maximum to six minimum?

A. Yes, sir.

[fols. 168-175] BERNARD B. BAILEY, a Defendant, appearing in his own behalf, having been previously sworn, was examined and testified as follows:

. . . . . .

[fol. 176] Q. Now, with regard to No. 2, was all of the stretch across from the house to Colvin Run visible from the house and yard?

A. Yes, and it formed a very beautiful estate looking from the house.

Q. Was the upper part, where the dam is, visible or not?

A. No, sir; not from the house.

Q. You could not see in that narrow neck up there.

At what did you value the fifteen acres at the time that the road was put through, prior to the taking?

A. Five thousand dollars; between three hundred and three hundred and fifty dollars an acre.

Q. Your valuation, then, on the dwelling and fifteen acres, in 1941 was $15,000?

A. Yes, sir.

. . . . . .

[fols. 177-185] Q. Mr. Bailey, you were estimating the damage to the dwelling and these approximately fifteen acres at about $10,000?

A. You mean the value, not the damage.

Q. The decrease in value. You claimed it was worth $15,000 before and about $7,000 afterwards?

A. Yes, sir.

. . . . . .

[fol. 186] Q. What was the value of those buildings at the time the road went through?

A. You are not speaking now of the barn over on the other piece?

Q. Did you include that too, in that? I forgot about that.

A. There is another barn on No. 3.

Q. That is the old red barn?

A. Yes.

[fol. 187] Q. That was there when you bought the property?

A. Yes, sir. I valued all of those buildings at $3,500. The Coulter barn someone said yesterday was in poor condition. It is true that there are one or two places where the posts have got to be renewed, but otherwise the barn is in good condition. I put a new roof on it about a year before this road was started, and the framing in the barn is in good condition. It is constructed in a way that barns are not constructed today. It is good construction.

The dairy barn is built for twenty cows. It is one story and has been put up to pass the requirements of the District of Columbia.

Q. What valuation did you put on those buildings?

A. $3,500.

Q. And what valuation did you place on it after the road went through?

A. The buildings today, I think, are very greatly depreciated, because of the fact that the barns are now on the wrong side of the road, the new highway, the fields in Tract No. 2 and Tract No. 4, and this 10-acre tract back where the dam was.

. . . . . .

[fols. 188-192] A. I didn't state what I thought the value of the barns is now, I believe. I think that as a result of that the barns are not worth any more than $500 to anyone who would contemplate operating a dairy there, and those barns are for that purpose and were constructed for that purpose, for farm operations.

Q. In other words, the man who buys the place for that purpose will tear these barns down and put them across where he can get cattle to them, is that right?

A. That's it.

. . . . . .

[fol. 193] Q. Now, with regard to the Coulter property and—what was that other property you bought?

A. I bought it from Center Merry and Mr. Holmes.

Q. In what year did you buy that?

A. '39, the same time.

Q. That is two years before this road went through?

A. Yes, sir.

Q. I ask this subject to objection: What was the purchase price of those two pieces per acre?

A. Per acre, around, between four and five hundred dollars.

Q. What did you pay for the two pieces?

A. I paid $4,700.

Q. For how many acres?

A. There is six and a half acres, and it has the little cottage and the barns. I bought the cottage, everything in the cottage, the barns and the whole land.

Q. You placed a value on those ten acres and the cottage at the time the road was taken of $6,000, is that correct?

[fols. 194-208] A. Yes, sir.

Q. What valuation do you place on it after the road was constructed?

A. $2,500.

Q. Your claim is that there is a loss there of $3,500. What do you take into consideration in estimating that?

A. The excavation for the new highway, this deep cut of 37 feet, was made approximately fifty feet from the cottage, or maybe seventy-five, and it leaves the cottage hanging in mid-air. It is a very dangerous place for anyone to live without the construction of a proper fence down that cut. No one would attempt to have children running out there without a proper fence, and it would have to be a

fence which they couldn't climb over, because it is certain death if anybody ever steps off that cut from that cottage. Even a grown person has to be very careful walking up there now to the cottage along the cut, and if you are the least bit dizzy it is very hard to keep your balance when you look down that cut.

* * * * * * *

[fol. 209] A. No, sir. I would like to make one statement here that doesn't enter into the question of damages or value, but it does enter into the issues which have been drawn by these pleadings in regard to the constitutionality of this law.

The Court: The Commissioners are not concerned with that.

The Witness: I don't know how we are going to get it in the record.

The Court: It is already in the record.

The Witness: The testimony about how the settlement was handled by the Highway Department under the law, sir?

The Court: Is that not set up in your pleadings?

The Witness: No, sir.

By Mr. Ball:

Q. Did they attempt to settle with you?

A. Yes, sir.

Q. Did you refuse to make a settlement?

A. I did.

[fol. 210] Q. And why did you refuse?

A. Well, they offered me $2,000 for the whole thing. I didn't accept it because I didn't want the road there and I did everything I could to prevent it from being put there, and I told Mr. Browning—A. T. Browning, I think it is, or A. W.—who is the Junior Highway Commissioner, that I wouldn't accept his offer and didn't want the road through the property. He told me that if I didn't accept the $2,000 I would have to accept the consequences. I asked him what he meant. "Well," he said, "under the statutes of Virginia, the State Highway Commissioner has the right, and we are going to exercise that right, to take your property and build this highway through there whether you like it or not, and then you will have to wait until we

get through with the highway and sixty days thereafter before you will get any settlement."

He said, "Just bear that in mind in deciding whether you are going to take $2,000 or not."

I still refused and, of course, we brought the injunction suit later, and contested the constitutionality of the Act, which we are also doing in this case.

Mr. Ball: I think that is all.

Cross-examination.

By Mr. Rust:

Q. Mr. Bailey, you refused absolutely to permit the road to go through your property, and you refused absolutely to make any settlement whatever with the Highway people? [fols. 211-230] A. I did.

Q. And you did everything in the world you could to prevent them from putting the road through?

A. I did, and not only I did, but other property owners with me.

Q. And you did not try to work out any proposition with them with reference to the construction of the road or in reference to your land whatever?

A. No, sir. We protested against the construction of that highway all the way through, because we knew that it would blight all that property.

* * * * * * *

[fol. 231] I just would like to state, if I may, the reason for the confusion that I got into in giving these valuations to the Court and to the Commissioners. I estimated the values and the damages on a different theory from that which Mr. Rust presented, and I did it for this reason, that the residence and fifteen acres naturally go together, and I placed a value on that, and the land where the cottage is and all that hill land is another development there; and then, of course, the bottom land in the rear, where the lake was, is different property also, so that there are three different elements of value there, three different pieces of property.

Q. Of course, the only question before the Commissioners is, what was the land worth when the road went through, and what was it worth after the road was constructed?

A. That's right, and that is what I tried to show. In other words, before the road was built I considered that [fol. 232] we had a colonial residence there with grounds suitable for its enjoyment, and that we had a hill-land there that was suitable for the development of a magnificent dwelling.

Q. How many rooms were there in the original brick part of the house? Just four rooms, did you say?

A. Four rooms and the bathroom part.

Q. And that house now, you say, faces on the old road?

A. The rear of the house is on the old road.

Q. It is on the new road.

A. On the new road, yes.

Q. On account of the conditions that exist there, and the unsightliness that you have testified to, do you not think it is better for the house to face on the old road than to face on the new road?

A. No, I don't, because the way it is now, we have two roads, and facing on the old road doesn't offset the damage that is caused by the back of the house being on the new road.

Q. But if the view across there is so unsightly and the conditions are so unsightly, would you not rather have the house facing just as it is?

A. No, sir, for this reason, that when we used the property before the road was built, the area in the back of the house was the real property for the real development of a place of spacious grounds for the enjoyment of someone who wanted a house like that, and we never intended to [fol. 233] develop the front part of it for that purpose. We did put that rock wall there around that well to hold the dirt and to beautify the front part of the place, and we put shrubbery there, but we did not anticipate that we would use the front part of the property for the purpose of quiet and rest and enjoyment.

Q. That was not built as a colonial house as much as just a miller's house, was it not?

A. No, sir.

Q. Was it not built in connection with the mill?

A. No, sir. That house was built by Mr. Carper.

Q. The mill was there at the time it was built, was it not?

A. It wasn't the miller's house; it was the man who owned the mill who built the house. It is not a miller's house, if that is what you are trying to say.

Q. The miller lived in the house when he ran the mill, and you are the first man who has ever lived there who has never run the mill.

A. I have run the mill.

Q. I mean, as it was always run.

A. I have run the mill, and intend to run it.

Q. I do not see that that has a thing to do with the value of that house on October 15, 1941, when this road was started.

Mr. Ball: Do you mean by that, Senator Rust, that the man who did labor in the mill was the man who lived in the house?

Mr. Rust: No; I mean that instead of it being an old [fols. 234-242] colonial house it was just a four-room brick house in which the miller lived when he ran the mill.

* * * * * * * *

[fol. 243] IN CIRCUIT COURT OF FAIRFAX COUNTY

REPORT OF COMMISSIONERS—Filed July 12, 1944

* * * * * * *

We the undersigned duly appointed Commissioners and free-holders to ascertain what will be a just compensation for the land or other property or for the interest or estate therein proposed to be condemned for highway uses and to award damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person from the construction and operation of said highway as described in the petition filed in this cause, after being duly sworn, in the custody of E. P. Kirby, Sheriff, and there being present John W. Rust, Agent and Attorney for the State Highway Commissioner, Frank L. Ball, Attorney for the Defendant, Bernard B. Bailey, Bernard B. Bailey and W. F. Smith, representative of the State Department of Highways, viewed the land described in the petition filed in this action on the 11th day of July, 1944, the day designated in the order entered in this action, and reported this fact to the Court, and after hearing such testimony of the issues joined in Court, we are of the opinion and find that for the fee simple title of the Defendant in the 3.98 acres of land, more or less, the sum of $1,500.00 will be a just

compensation, and that there was $6,500.00 damages resulting to the adjacent or other property of the owner from the construction and operation of said highway, and that there will be no damages to the property of any other person from the construction and operation of said high-
[fols. 244-245] way.

It is stipulated and agreed that the State Highway Department will keep the pipes under the new highway and also the tail race where located upon the State right of way free from dirt or other obstructions, so as not to affect the operation of the mill and so as not to prevent the proper and normal flow of the water to the mill and through the tail race. It is further understood and agreed that this stipulation and agreement relates to the period and time that the mill will be operated. On account of the above agreement and understanding the Commissioners in arriving at their award may not take into consideration any damages *accur-ing* to the mill and its operation by reason of the construction of the new highway, and the commissioners in making their report shall give full force and effect to this stipulation and agreement. We have considered this stipulation and do hereby make it a part of our findings and our report.

Given under our hands this 12th day of July, 1944.

(Signed) H. B. Mitchell, B. M. Bridwell, Carroll V. Shreve, J. C. Hoskins, John F. Bethune, Commissioners.

Recorded among the Land Records of Fairfax County, Virginia, in Deed Book No. 434, at page 460.

[fol. 246] In Circuit Court of Fairfax County

Exceptions of Defendants to Report of Commissioners—Filed July 18, 1944

* * * * * * *

To the Honorable Paul E. Brown, Judge of the Said Court:

Comes now the defendant, Bernard B. Bailey, and excepts to the report of the Commissioners made herein on the 13th day of July, 1944, on the ground that the amounts awarded as compensation for the land taken for the highway

and for damages to the residue resulting from the highway construction are grossly disproportionate to the claims made by the defendant, which claims were based upon a view of the property before as well as after the property was mutilated and disfigured by the highway construction.

(Signed) Bernard B. Bailey, Eunice R. Bailey, by Counsel.

(Signed) Frank L. Ball, Counsel for Defendants.

[fol. 247] IN CIRCUIT COURT OF FAIRFAX COUNTY

EXCEPTIONS OF PETITIONER TO REPORT OF COMMISSIONERS—Filed July 20, 1944

* * * * * * *

J. A. Anderson, State Highway Commissioner of Virginia, files this his exceptions to the report filed by the Commissioners in the above entitled suit, on the 12th day of July, 1944, he having asked leave of the Court to file written exceptions to the said report within ten days after the rendering of the same by the Commissioner and before the Judge passed thereon, and for exceptions to said report states as follows:

1. That the report valued the 3.98 acres of land, more or less, actually taken for road purposes, at $1,500.00, and the damages resulting to the adjacent or other property of the owner at $6,500.00. The Petitioner produced six witnesses, three of whom were real estate agents, two were local men, thoroughly familiar with values in the Colvin Run community, and who had known the property all their lives, and Mr. T. W. Ross, State Highway Engineer None of these witnesses estimated the damages at more than $3,000.00 including the land taken. The only testimony as to the value of the land offered by the Defendant, was his own testimony, which valued the land at a very high price. Of course, he was an interested witness, and the three real estate men, T. P. Johnson, Ray Barney and James Barney, and the local witnesses, Harry V. Leigh and Lawrence Leigh were entirely disinterested witnesses, and it is submitted to the Court that the preponderence of the evidence, was [fol. 248] strongly in favor of the Petitioner, and while it is true that the Commissioners viewed the land, yet it is submitted that such a heavy preponderence of the evidence

should prevail, and that the award was excessive, both as to the value of the land taken and the damage to the residue of the land. The witnesses for the Petitioner testified that the land taken should not have been valued at more than $200.00 an acre, and that, in their opinion, the residue of the land would bring as much on the market after the construction of the road as it would have brought prior to the construction thereof. It is further submitted that a large portion of Mr. Bailey's testimony was irrelevant and immaterial and should not have been admitted, as it gave the Commissioners a false impression as to the actual value of the property and the actual damages to the property by the construction of the road. It is submitted that the question at issue was the value of the property prior to the construction of the road and the value of the property immediately after the construction of the road; and that this value should have been based upon what the property would have brought prior to the construction of the road and what the property would have brought subsequent to the construction of the road; and that the sentimental value placed thereon by Mr. Bailey was not a proper element of damages; and that the Commissioners were prejudice- by his testimony; and that they completely disregarded the testimony of the six witnesses introduced by the Petitioner; and that the award was certainly contrary to the preponderence of the evidence and disproportionate [fol. 249] to the injuries actually inflicted upon the land; and your Petitioner is of the opinion that an injustice was done to the State Highway Department by the rendering of the excessive award of the Commissioners, as there was not sufficient evidence to support the award.

2. Evidence was also introduced contrary to the stipulation agreed to between the parties and filed in the papers, as it was understood and agreed that "the Commissioners in arriving at their award may not take into consideration any damages accruing to the mill and its operation by reason of the construction of the new highway", and Mr. Bailey was permitted to testify at considerable length in reference to the improvements to the mill and the condition thereof, when this question had been eliminated by the stipulation and agreement.

3. That a considerable amount of improper and immaterial testimony was permitted to be introduced by the

Defendant and that numerous exceptions were taken to this testimony and the rulings of the Court; and that this immaterial and improper testimony should not have been presented to the Commissioners.

4. That the Court declined to permit the Petitioner to introduce in evidence, the three deeds conveying the land to Mr. Bailey, which deeds conveyed the three tracts of land, which were traversed by the new highway, namely a deed dated August 1, 1934, and recorded in Liber O, No. 11, Page 229 of the deed books of Fairfax County, Virginia, from Samuel Miller and others to Bernard B. Bailey, conveyed him 32 acres and 2 roods of land, more or less; the [fol. 250] deed from William Bessie Coulter and James H. Coulter, her husband, to Bernard B. Bailey dated September 1, 1939, and recorded in Liber Q, No. 13, Page 316 of the deed books of Fairfax County, Virginia, conveyed to him 2.931 acres; and the deed from Grace M. Holmes and William F. Holmes, her husband, and others to Bernard B. Bailey dated September 1, 1939, and recorded in Liber Q, No. 13, Page 313 of the deed books of Fairfax County, Virginia, conveyed 3.524 acres. It is submitted that in order for the Commissioners to understand and arrive at a proper conclusion, as to the value of the land and the damages thereto that they should have had these deeds before them, in order to have a picture of the location of the land, the distance along the old highway and the frontage thereon prior to the construction of the new road, and other measurements and distances, as each of the said deeds contain a metes and bounds description of the land, and the introduction of these deeds would have given them a better picture of the land, its location and distances. The deeds offered in evidence were certified copies and are signed by Thomas P. Chapman, Deputy Clerk, and in the opinion of the Petitioner should have been introduced and presented to the Commissioners for their information. They were excluded by the Judge of the Court because of his statement that they showed the United States Revenue Stamps and the price that Mr. Bailey had paid for the land. It is further submitted that it was proper to show to the Commissioners the actual amount paid for the land by Mr. Bailey as he testified he paid $4,700.00 for the two smaller parcels of land purchased on September 1st, 1939, [fol. 251] but declined to state what he paid for the 32 acres

and 2 roods of land, which he purchased on August 1st, 1934, although he testified at great length as to what improvements he had placed upon the property since purchasing the land and stated that shortly after purchasing the land he spent $2,000.00 in repairing the house, and that he built a new barn on the property, made improvements to the mill, etc., and it is submitted in view of his testimony, that the Commissioners should have been informed as to the price that he paid for the land on August 1, 1934, which was $9,000.00 making a total purchase price for the land of $13,700.00, and he was awarded $8,000.00 damages. It is believed that this testimony was important and that the Commissioners should have had this information before they arrived at their award, and it is submitted that $8,000.00 damages to land, which cost $13,700.00 is excessive and not justified by the facts, as none of the buildings were injured by the construction of the highway as the highway did not come within 100 feet of any of the buildings.

It is submitted that the award is excessive and not justified by the evidence and facts, and that the exceptions to the report should be sustained, and that the Court should either reduce the damages in accordance with the evidence and facts to a fair amount, or that the Court should set aside the award and appoint new Commissioners to go upon the land and assess proper damages.

Respectfully submitted, J. A. Anderson, State Highway Commissioner of Virginia, by (Signed) John W. Rust, Agent and Attorney.

[fol. 252] IN CIRCUIT COURT OF FAIRFAX COUNTY

DECREE—August 11, 1944

This cause came on to be heard upon the papers formerly read, the certificate of W. Franklin Gooding, Deputy Clerk of the said Court, who administered the oath to the Commissioners Buford M. Bridwell, Harry B. Mitchell, J. C. Hoskins, Carroll V. Shreve and John F. Bethune, freeholders, which said certificate was filed July 11th, 1944, on this the 24th day of July, 1944, the report of the Commissioners dated July 12th, 1944, and filed and returned to the Clerk's Office on July 12th, 1944 and the thirty days required by statute for the report to remain in the Clerk's Office being

waived by counsel for the petitioner and counsel for the defendants, the exceptions filed by the petitioner July 20th, 1944, and the exceptions filed by the defendant Bernard B. Bailey on July 18th, 1944, to the report of the Commissioners, and upon the defendant's claim for interest on Six Thousand Five Hundred Dollars ($6500.00), being the amount awarded in said report as damages to the residue of the defendant's property resulting from the construction of the highway through the defendant's land, and argument of counsel.

Upon Consideration Whereof, it appearing to the Court that the said Commissioners viewed the land described in said petition on July 11th, 1944, and reported to the Court on July 11th, 1944, that they had viewed the land in the custody of the Sheriff of said County, and the Court, in term time, after receiving the said report set the case for hearing on the issues joined on the 11th day of July, 1944, and the [fol. 253] said Commissioners after hearing the testimony in open Court filed their report on the 12th day of July, 1944, the case having taken two days for hearing, said report stating that for the fee-simple title to the defendant in the 3.98 acres of land, more or less, the sum of $1500.00 will be a just compensation, and that there was $6500.00 damages resulting to the adjacent or other property of the defendant from the construction and operation of the said highway, and that there was no damages to the property of any other person from the construction and operation of said highway as described in the said petition, the Court doth approve, ratify and confirm he said report in all respects and doth confirm unto the Commonwealth of Virginia, as provided by statute, all right, title, interest and estate of the said defendants, in and to the particular parts of the land belonging to the defendants, which are affected by this proceeding, and fully shown on the blue print and plat identified as Sheets Nos. 3 & 4, Project 514-E, Route 7; marked Exhibit "B", and attached hereto, said strips or parcels of land being described as follows:

. . . . . .

[fol. 254] And, thereupon, the petitioner excepted to the rulings of the Court in confirming the said Commissioners' report, and the defendant, Bernard B. Bailey, excepted to the rulings of the Court in confirming the said Commissioners' report.

Whereupon, the defendant stated to the Court that no claim was being made for interest on the One Thousand [fol. 255] Five Hundred Dollars ($1500.00), being the amount awarded in said report as compensation for the value of the land taken for the highway, and, in order to evidence that fact, the defendant moved the Court for permission to amend paragraph three of the defendant's grounds of defense, filed herein on April 22nd, 1944, so that said paragraph would read as follows: "The defendant claims interest at the lawful rate on the amount awarded as damages from October 15, 1941, when the property herein was seized by the petitioner, until payment is made." The defendant also moved the Court to allow him costs in the sum of Forty Dollars ($40.00), being the amount paid by the defendant to the reporter who, at the instance of the defendant, recorded the testimony and proceedings at the hearing held in this Court before said commissioners on July 11th and 12th, 1944.

After hearing argument of counsel for the parties the Court being of the opinion that no grounds exist for setting aside said report of the Commissioners, and being of the opinion that the defendant is not entitled to interest on the amount awarded by the Commissioners, and the Court being of the further opinion that the defendant is not entitled to the costs which he claims, it is; therefore, ordered and adjudged as follows:

(a) That the motion of the defendant, Bernard B. Bailey, to amend his said grounds of defense in the manner aforesaid be, and the same is hereby denied, and to the action of the Court in denying said motion and disallowing said amendment the defendant by counsel excepted.

(b) That the defendant's claim for interest on the $6500.00 from October 15, 1941, until payment, be and the [fol. 256] same is hereby denied, and to the Court's ruling in this respect the said defendant by counsel excepted.

. . . . . .

(d) That the petitioner shall deposit with the Clerk of this Court, the sum of $8000.00, for the benefit of the defendant, Bernard B. Bailey, the said payment to include any deposit heretofore made with the Clerk of this Court in accordance with law, and the Clerk is directed to pay the said amounts deposited with him in accordance with the

further order of this Court, to which ruling and order of the Court the defendant by counsel excepted.

(e) That the sum of $8000.00 awarded by the Commissioners shall bear interest at the rate of 6% per annum from August 11th, 1944, until paid, to which ruling of the Court defendant by counsel excepted.

(f) That upon the payment of the sums aggregating $8000.00, together with the interest allowed as heretofore set forth, title to the property taken and rights condemned in these proceedings shall vest in the Commonwealth of Virginia in fee-simple, and upon the payment of the said $8000.00 to the Clerk of said Court, he shall receipt for the same, and the said Clerk shall and he is hereby directed to record the said receipt, and to record a copy of this decree and report of the Commissioners in the current deed books and to properly index the same, and the said sum of $8000.00 shall be retained by the Clerk of said Court [fol. 257] subject to the further order of the Court, to which ruling of the Court defendant by counsel excepted.

(g) The stipulation heretofore filed with the commissioners relating to the cleaning of the mill race as it passes through the culvert under the land condemned by the petitioner and to the cleaning of the tail race through the land condemned by the petitioner, which is as follows:

* * * * * * *

shall be considered as a part of the order of this Court.

The defendant, Bernard B. Bailey, having signified his intentions of applying to the Supreme Court of Appeals of Virginia for a writ of error to the said rulings of the Court and to the Rulings of this Court made and entered herein [fol. 258] June 9, 1944, to-wit, that the statutes of the State of Virginia under which the land of the defendant was taken by the plaintiff are not in violation of the Fourteenth Amendment of the Federal Constitution, and that paragraph four of the defendant's grounds of defense filed herein on April 22, 1944, which claimed compensation for the use of the land taken by the plaintiff for the highway is not a valid claim, and that said paragraph be stricken from the defendant's grounds of defense, to all of which rulings made and entered herein on June 9, 1944, the defendant duly excepted, it is, therefore, further ordered

and adjudged that the operation of this final judgment is suspended for a period of ninety days from this date, and the defendant is required to enter an appeal bond in the penalty of Five Hundred Dollars ($500.00) conditioned as the law directs, in accordance with the statutes in such cases made and provided.

Enter:

(Signed) Paul E. Brown, Judge.

August 11th, 1944.

[fol. 259] IN CIRCUIT COURT OF FAIRFAX COUNTY

RECEIPT OF CLERK

Fairfax, Virginia,
August 22nd, 1944.

Received of the Commonwealth of Virginia, Department of Highways, the sum of Eight Thousand Eleven and 84/100 Dollars, ($8011.84), by check of the Department of Highways, payable to John M. Whalen, Clerk of Circuit Court of Fairfax County, in full payment of the amount directed by the said Court to be paid by the State Highway Commissioner of Virginia to me as Clerk, by the decree of the Circuit Court of Fairfax County, Virginia, entered on the 11th day of August, 1944, in the Chancery Cause of J. A. Anderson, State Highway Commissioner of Virginia, Petitioner, versus Bernard B. Bailey, et al., Defendants, No. 6046, pending in said Court, this being the same payment covered by official receipt F4 #7187 dated August 19, 1944, this additional receipt being issued in obedience to the provisions of said decree requiring that said receipt be recorded, along with a copy of said decree and the report of the commissioners in said suit, in the Current Deed Book of this County.

John M. Whalen, Clerk, by (Signed) Thomas P. Chapman, Jr., Deputy Clerk.

Recorded in Liber 434, page 455, of the Land Records of Fairfax County, Virginia, and indexed and Ex.

[fol. 260] IN CIRCUIT COURT OF FAIRFAX COUNTY

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed October 9, 1944

* * * * * * * *

It is hereby stipulated that upon the application for a writ of error being made in behalf of the defendants, Bernard B. Bailey and Eunice R. Bailey to the Supreme Court of Appeals of Virginia, the record shall consist of the following:

1. All pleadings filed herein.

2. All evidence taken before the presiding Judge and the Commissioners.

3. All orders of Court entered herein.

4. All exhibits introduced in the hearing, the originals to be certified to the Appellate Court without the necessity of copying the same in the record.

5. The complete record in the case of Bernard B. Bailey vs. J. A. Anderson, State Highway Commissioner of Virginia, as the same is shown in the printed record in the Supreme Court of Appeals of Virginia, record number 2708; it being understood that the printed record itself shall be used upon this appeal without the necessity of identification by the Trial Court or the Clerk thereof.

6. Photostatic copies of the three deeds offered in evidence by the Petitioner and referred to on Page 25 of the record, the originals to be certified to the Appellate Court without the necessity of copying the same in the record.

[fols. 261-267] 7. This stipulation.

(Signed) John W. Rust, Attorney for State Highway Commissioner of Virginia. Frank L. Ball, Attorney for Bernard B. Bailey and Eunice R. Bailey.

[fol. 268] IN THE SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

BERNARD B. BAILEY, Plaintiff in Error

versus

J. A. ANDERSON, State Highway Commissioner of Virginia, Defendant in Error

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Bernard B. Bailey, respectfully shows that he is aggrieved by a final judgment entered by the Circuit Court of Fairfax County, Virginia, on August 11, 1944, in a certain condemnation proceeding instituted by defendant in error against plaintiff in error, et al. A transcript of the record is presented herewith. Your petitioner has duly executed appeal bond in the sum of $500.00, as directed by the Trial Court.

ASSIGNMENTS OF ERROR

Your petitioner assigns error on the part of the Trial Court in the following particulars, to wit:

1. In denying interest, from the time of entry on the property of plaintiff in error, on the amount awarded by the commissioners as damages, the Court allowed the taking of the property without just compensation in violation of Section 6 of the Virginia Constitution, and deprived plaintiff in error of his property without due process of law contrary to the due process clause of the Fourteenth Amend-
[fols. 269-278] ment of the Federal Constitution.

2. The Court erred in holding that the statute under which the property was taken (Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j (6)) is not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution.

3. In denying compensation for the use of the property, the use being based upon said statute, the Court deprived plaintiff in error of his property without due process of

law contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution.

4. The Court erred in denying to plaintiff in error reimbursement for the amount paid to the court reporter for his attendance and services at the hearing.

* * * * * * *

[fol. 279] QUESTIONS INVOLVED

1. Where, under the power of eminent domain, land is taken and disfigured before instituting condemnation proceedings, does Section 6 of the Virginia Constitution, and does the due process clause of the Fourteenth Amendment of the Federal Constitution, require that interest be allowed, from the date of taking, on the amount awarded in [fol. 280-287] the proceedings as damages resulting to the adjacent or other property of the owner?

2. In the light of the statutory requirement that the Court shall direct the commissioners in condemnation proceedings "to view the land", and in the light of the rule that compensation for land taken for highway construction is based upon the value before the taking and the rule that the damages resulting to the adjacent or other property of the owner from the construction are measured by taking the difference between the value before the taking and the value after the completion of the construction, does the statute in question (Acts 1940, ch. 380, p. 666, Sections 4 and 6; Michie's Code, Sections 1969j(4) and 1969j(6)) deprive the owner of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution in providing that the defendant in error may enter upon and take possession of the property and proceed with the construction and, within sixty days after the completion of the construction, shall institute condemnation proceedings, with the further provision that it is the intention of the statute to provide that the property "may, in the discretion of the Commissioner, be condemned after the construction of the highway, as well as prior thereto?"

3. If the statute in question, which constituted the sole authority for taking and using the property, is unconstitutional, as contended, did the Trial Court deprive the plaintiff in error of his property without due process of law,

contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution, by denying his claim for compensation for the use of the property.

* * * * * * *

[fol. 288] CONCLUSION

The petitioner, therefore, respectfully prays that he may be awarded a writ of error; that this Honorable Court may review the actions of the Trial Court; that the said judgment of August 11, 1944, may be modified so as to allow interest on $6,500.00, the amount awarded as damages, as claimed; that the statute in question (Acts 1940, ch. 380, p. 666, Sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6)) be declared to be in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States; that the plaintiff in error may be awarded compensation for the use of his property from October 15, 1941, until he is divested of title; and that this cause be remanded for further proceedings to determine the reasonable value of the use of the property; and finally that the plaintiff in error may be reimbursed for the amount paid to the court reporter as claimed.

Copy of this petition was delivered to John W. Rust, Esquire, attorney for the defendant in error, on the 19th day of October, 1944.

Counsel for petitioner adopts this petition as his opening brief.

(S.) Bernard B. Bailey, Frank L. Ball, Attorneys for Petitioner.

Received; October 21, 1944.

M. B. Watts, Clerk.

* * * * * * *

[fols. 289-291] IN SUPREME COURT OF APPEALS OF VIRGINIA

ORDER REFUSING WRIT OF ERROR—November 22, 1944

* * * * * * *

The petition of Bernard B. Bailey for a writ of error to a judgment rendered by the Circuit Court of Fairfax county on the 11th day of August, 1944, in a certain condemna-

tion proceeding then therein depending wherein J. A. Anderson, State Highway Commissioner of Virginia, was plaintiff and the said petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

[fol. 292] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—February 15, 1945

Bernard B. Bailey, the appellant herein, considering himself aggrieved by the final judgment of the Supreme Court of Appeals of Virginia, entered on November 22, 1944, in the above entitled cause, presents this petition for appeal therefrom within three months thereafter and respectfully shows that the case is one in which, under the legislation in force when the Act of January 31, 1928 (28 U. S. C. A. 861a) was passed, a review could be had in the Supreme Court of the United States on writ of error.

The final judgment from which appeal is sought was rendered in a suit in the highest Court of Virginia in which a decision could be had, in which there was drawn in question the validity of a Virginia statute on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. The suit was instituted on June 17, 1943, in the Circuit Court of Fairfax County, Virginia, by the State Highway Commissioner of Virginia for the purpose of condemning for highway purposes certain real property of the defendant, the appellant herein, the petition being filed one year and eight months after the State Highway Commissioner deposited with the Clerk the sum of $1,500 and seized the property. The defendant filed an answer setting up his claim for compensation and damages, with interest thereon from the time of [fol. 293] the seizure until payment. The defendant set up also a claim for compensation for the use of the property for highway purposes, dating from the time of seizure, on

the ground that the use was unauthorized because it was based entirely on Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6), which was expressly assailed as being repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States in that it allows the State Highway Commissioner to enter and construct the highway and mutilate and disfigure the property, and prevents the owner from having his property viewed by commissioners before the mutilation and disfigurement are completed, and the defendant alleged that to deny him compensation for the unauthorized use would deprive him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The Circuit Court of Fairfax County expressly held that the statute assailed is not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, and ordered that the claim for compensation for the use of the property under the statute be stricken from the answer. The commissioners appointed by the Circuit Court, pursuant to the requirement of Section 1969j(2) of the Virginia Code, viewed the property, heard the testimony, and awarded $1,500 as compensation for the property taken and $6,500 as damages to the residue. The claim for interest was not presented to the commissioners. After the award was made by the commissioners the defendant, withdrawing his claim for interest on the amount awarded as compensation for the property taken, presented to the Circuit Court his claim for interest on the $6,500 awarded as damages to the residue of his property from October 15, 1941, when the property was seized, until pay-
[fol. 294] ment is made, which claim was denied by the Circuit Court.

Final judgment of the Circuit Court was entered on August 11, 1944. The judgment was suspended pending petition for writ of error to the Supreme Court of Appeals of Virginia to review the said rulings of the Circuit Court denying the claim that the statute assailed is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States and denying the claims for compensation for the use of the property and for interest on the damages awarded.

On petition to the Supreme Court of Appeals of Virginia for a writ of error, in which said claims were reiterated, and in which the further claim was made that in denying interest on the amount awarded as damages the Circuit Court deprived the defendant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of Appeals of Virginia, by order entered on November 22, 1944, expressly affirmed the judgment of the Circuit Court, the decision of the Supreme Court of Appeals of Virginia being in favor of the validity of the statute assailed and against the claims for compensation for the use of the property taken and for interest on the damages awarded, the other reading as follows:

> "The petition of Bernard B. Bailey for a writ of error to a judgment rendered by the Circuit Court of Fairfax county on the 11th day of August, 1944, in a certain condemnation proceeding then therein depending wherein J. A. Anderson, State Highway Commissioner of Virginia, was plaintiff and said petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court."

Jurisdiction of the Supreme Court of the United States on appeal is therefore invoked under Section 237(a) of the Judicial Code (28 U. S. C. A., section 344(a)), as amended.

[fol. 295] ASSIGNMENT OF ERRORS

The petitioner, Bernard B. Bailey, assigns the following errors in the record and proceedings in the Supreme Court of Appeals of Virginia in the above entitled cause:

1. The Supreme Court of Appeals of Virginia erred in holding that the statute assailed, being Acts 1940, c. 380, p. 666, sections 4 and 6, Virginia Code Supp. 1940, now Virginia Code 1942, sections 1969j(4) and 1969j(6), under which the appellant's property was seized, mutilated, and used by the appellee for highway purposes, is not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, in that the

statute assailed, by vesting in the appellee the power to enter upon and mutilate property and, while mutilating it, to control the time for instituting condemnation proceedings to determine the amount of compensation and damages to be paid, enables the appellee to manipulate a procedural phase of the condemnation, in a manner detrimental to the owner, by holding off the appointment of commissioners to view the property until the appellee has mutilated and disfigured it to such extent that when, in the exercise of the discretion conferred by the statute assailed, the appellee permits the commissioners to view the property they can not visualize the condition thereof as it was immediately before the seizure, the result being to render it exceedingly difficult, if not impossible, for the owner to establish the just compensation for the property taken and the damages to the residue, inasmuch as the Virginia law in condemnation cases is that the viewing of the property by the commissioners is the important and controlling factor in the determination of compensation and damages outweighing the evidence adduced at the hearing held after the view has been made, and that the compensation is determined by ascertaining the value of the property taken immediately [fol. 296] before the seizure, and the damages are determined by ascertaining the difference between the value of the residue immediately before the seizure and the value thereof immediately after completion of the highway construction; and in that the unconstitutional power and control bestowed by the statute was deliberately and oppressively imposed by the appellee upon the appellant to his detriment and damage.

2. The Supreme Court of Appeals of Virginia erred in denying to the appellant compensation for the use of his property taken for the highway, in that the use is unauthorized inasmuch as it is based entirely upon the unconstitutional statute assailed, and compensation for the unauthorized use of the property is a part of the just compensation to which the appellant is entitled, and the denial thereof deprived him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

3. The Supreme Court of Appeals of Virginia erred in denying to the appellant interest on the amount awarded as damages to the residue of the appellant's property from

the time of the commencement of the mutilation of the property by the appellee until the appellant receives payment, in that interest on the damages awarded is a part of the just compensation to which the appellant is entitled, and the denial thereof deprived him of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

PRAYER FOR REVERSAL

For which errors the appellant prays:

1. That the decision and judgment of the Supreme Court of Appeals of Virginia in the above entitled cause be reversed.

[fol. 297] 2. That the statute assailed be declared unconstitutional, as being repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

3. That the appellant's claims (a) for compensation for the use which the appellee has made and continues to make of the appellant's property under the statute assailed, and (b) for interest at the lawful rate on the amount awarded as damages to the residue of the appellant's property, from the date of the commencement of the mutilation until the date of payment, be recognized and upheld as valid and enforceable claims.

4. That a judgment be rendered in favor of appellant for his costs.

5. That the Clerk of the Supreme Court of Appeals of Virginia be directed to prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within a time to be fixed as required by law.

Appellant herewith tenders cost bond in such sum as the Court may require. Presented herewith is the cost bond, in the sum of $500.00, that was tendered to the Honorable Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia, who, on February 12, 1945, refused the appeal because he was of the opinion that the petition should be presented to a Justice of the Supreme Court of the United States. The sureties on the bond are those who

have acted as sureties on the bonds filed and approved for appeal to the Supreme Court of Appeals of Virginia in Bailey v. Anderson, 182 Va. 70, and for appeal to the same Court in the condemnation proceeding, which is the subject of the present appeal, and the amount of the bond is the same. Attached to the bond is the affidavit of the sureties to the effect that their equity in real estate in Arlington County, Virginia, is in excess of $500.00.

This the 15th day of February, 1945.

Bernard B. Bailey.

[fols. 298-326] In Supreme Court of Appeals of Virginia

Re: Bernard B. Bailey v. J. A. Anderson, State Highway Commissioner of Virginia

Order Refusing Petition for Appeal—February 12, 1945

The appeal presented in the case of Bernard B. Bailey v. J. A. Anderson, State Highway Commissioner of Virginia, is hereby refused by me this 12th day of February, 1945, as I am of the opinion that the petition should be presented to a Justice of the Supreme Court of the United States.

Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia.

[fol. 327] In the Supreme Court of the United States

Bernard B. Bailey, Appellant,

vs.

J. A. Anderson, State Highway Commissioner of Virginia, Appellee

Order Allowing Appeal—February 15, 1945

Bernard B. Bailey, appellant, having prayed for the allowance of an appeal in the above entitled cause to the Supreme Court of the United States from the judgment made and entered therein by the Supreme Court of Appeals of Virginia, on the 22nd day of November 1944, and from each and every part thereof, affirming a judgment entered

by the Circuit Court of Fairfax County, Virginia, on the 11th day of August, 1944, and having presented and filed his Petition for Appeal, Assignment of Errors, and Prayer for Reversal, and Jurisdictional Statement, pursuant to the statutes of the United States and the Revised Rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of Appeals of Virginia in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of Appeals of Virginia shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same, together with all papers filed, in accordance with the Revised Rules of the Supreme Court of the United States, to the Supreme Court of the United States, so that he shall have the same in said Court within not exceeding forty days from this date and from the date of signing the citation.

Appellant having tendered and filed a cost bond with good [fols. 328-330] and sufficient security conditioned as required by law in such cases made and provided, and in the sum of $500.00, said bond is accordingly approved.

Dated this 15th day of February, 1945.

Harlan F. Stone.

[fol. 331] *Citation in usual form showing service on J. A. Anderson omitted in printing.*

[fols. 332-333] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Honorable M. B. Watts, Clerk of the Supreme Court of Appeals of Virginia:

Appellant in the above entitled cause hereby indicates the portions of the record to be incorporated in the transcript thereof, as follows:

Petition to condemn land filed on June 17, 1943, by J. A. Anderson, State Highway Commissioner of Virginia, against Bernard B. Bailey, et al.

Pleading of Bernard B. Bailey, filed on July 9, 1943.

Pleading of Bernard B. Bailey, filed on March 16, 1944.

Order of April 6, 1944, denying motion for stay.

Answer of Bernard B. Bailey, filed April 22, 1944.

Motion to strike, filed by J. A. Anderson, State Highway Commissioner of Virginia, on May 12, 1944.

Order appointing commissioners, entered on June 9, 1944.

Oath of commissioners, filed on July 11, 1944.

Transcript of evidence on behalf of the plaintiff and defendant at the hearing on July 11 and July 12, 1944.

Report of commissioners, filed on July 12, 1944.

Stipulation of plaintiff and defendant as to operation of mill, filed on July 12, 1944.

Exceptions to report of commissioners, filed on July 18, 1944, by Bernard B. Bailey.

Exceptions to report of commissioners, filed on July 20, 1944, by J. A. Anderson, State Highway Commissioner of Virginia.

Decree of Circuit Court of Fairfax County, entered on August 11, 1944.

Receipt of Clerk of Circuit Court of Fairfax County, filed [fol. 334] on August 22, 1944, acknowledging deposit of $8,011.84 by Commonwealth of Virginia, Department of Highways.

Stipulation, filed on October 9, 1944, as to transcript of record in application to Supreme Court of Appeals of Virginia for writ of error.

Certificate of Clerk of Circuit Court of Fairfax County, dated October 19, 1944.

Petition for writ of error filed on October 21, 1944, by Bernard B. Bailey in Supreme Court of Appeals of Virginia.

Order of Supreme Court of Appeals of Virginia entered on November 22, 1944.

Petition of Bernard B. Bailey for appeal to the Supreme Court of the United States, Assignment of Errors, and Prayer for Reversal, dated February 15, 1945.

Jurisdictional Statement of Bernard B. Bailey, and attached Statement of the Honorable Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia, refusing appeal on February 12, 1945.

Order allowing Appeal, dated February 15, 1945, signed by the Honorable Harlan F. Stone, Chief Justice of the United States.

Cost Bond in the sum of $500.00, approved by the Honorable Harlan F. Stone, Chief Justice of the United States, and affidavit of sureties attached.

Citation, dated February 15, 1945, signed by the Honorable Harlan F. Stone, Chief Justice of the United States; bearing proof of service on February 21, 1945.

Proof of service of appeal papers, dated February 21, 1945.

Copy of this praecipe, dated February 21, 1945.

Bernard B. Bailey.

This February 21, 1945.

[fol. 335] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed April 10, 1945

The appellant adopts his assignment of errors as the statement of the points on which he intends to rely, and designates the following parts of the record, as filed, which he thinks are necessary for the consideration thereof, to wit:

Record from Circuit Court of Fairfax County

Parts of petition for condemnation filed June 17, 1943, as follows: page 2, second paragraph, beginning "Your petitioner"; page 5, paragraph 11; page 6, paragraph 12; pages 7 and 8, paragraph 14; page 8, first seven lines of paragraph 15, and first six words of eighth line of paragraph 15.

Statement filed July 9, 1943, omitting oath, page 10.

Statement filed March 16, 1944, omitting oath, pages 12 and 13.

Order entered April 6, 1944, page 15.

Parts of answer filed April 22, 1944, as follows: pages 16, 17, 18, 19 and 20; page 24, first two lines; page 25, first seven lines of paragraph 18.

Parts of motion to strike filed May 12, 1944, as follows: pages 27, 28 and 29; page 30, first four lines on the page and all of paragraphs 9 and 10; page 32, first sentence of paragraph 15; page 33, paragraph 16.

[fol. 336] Order entered June 9, 1944, omitting last paragraph and the signatures of attorneys, pages 34 to 36.

Oath of commissioners filed July 11, 1944, page 37.

Parts of the report of the evidence, as follows: pages 39 and 40.

Parts of testimony of T. W. Ross, as follows: page 127, the name "T. W. Ross" at bottom of page; pages 128, 129 and 130; page 131, first eight lines; page 138, all except first nine lines; pages 139 and 140; page 141, first thirteen lines; page 150, all except style of case; page 151, page 152, first six lines.

Parts of testimony of W. Frank Smith, as follows: page 152; page 153, first eleven lines; page 160, all except first four lines; page 161, first ten lines; page 163, all except first seven lines.

Parts of testimony of Bernard B. Bailey, as follows: page 168, first three lines; page 177, two questions and answers, beginning "Mr. Bailey you were estimating" and ending after "Yes sir"; page 186, last eight lines; page 187, first two lines; page 188, all except first fifteen lines and except the last line; page 193, last two lines; page 194, all except last seven lines; page 209, all except first seven lines; page 210; page 211, first eleven lines; page 231, all except first ten lines; page 232, first three lines.

Report of commissioners filed July 12, 1944, pages 243 and 244.

Parts of final judgment entered August 11, 1944, as follows: page 252; page 253, all except last nine lines; page 254, last six lines; page 255; page 256, all except paragraph (c); page 257, all except part quoted; page 258, all except signatures of attorneys.

Clerk's receipt August 22, 1944, page 259.

Stipulation October 9, 1944, pages 260 and 261.

[fol. 337] Record from Supreme Court of Appeals of Virginia

Parts of petition for writ of error, filed October 21, 1944, as follows: page 268; page 269, first fourteen lines; page 279, last six lines; page 280; page 288, all except certificate of attorneys at bottom of page.

Order entered November 22, 1944, page 289.

Appeal papers in Supreme Court of the United States

Petition for appeal, assignment of errors, and prayer for reversal, pages 292 to 297.

Statement of the Chief Justice of the Supreme Court of Appeals of Virginia refusing appeal, dated February 12, 1945, page 326.

Order allowing appeal, signed by the Chief Justice of the United States, dated February 15, 1945, pages 327 and 328.

Citation dated February 15, 1945, and proof of service on February 21, 1945, page 331.

Praecipe dated February 21, 1945, pages 333 and 334.

This statement of points and designation.

Dated April 5, 1945.

Bernard B. Bailey.

Service of the foregoing statement of the points to be relied upon and designation of the parts of the record the appellant thinks necessary for the consideration thereof is hereby accepted, and the receipt of a copy thereof is hereby acknowledged for and on behalf of the appellee this the 9th day of April, 1945.

J. A. Anderson, State Highway Commissioner of Virginia, by Abram R. Staples, his Attorney and Counsel.

[fol. 337½] [File endorsement omitted.]

[fol. 338] In the Supreme Court of the United States

* * * * * * * *

Designation of Appellee of Additional Parts of Record to Be Printed—Filed April 12, 1945

The appellee, J. A. Anderson, State Highway Commissioner of Virginia, designates the following additional

parts of the record as filed which he thinks are necessary for the consideration of appellant's assignments of error, to-wit:

Record from Circuit Court of Fairfax County.

Page 176—first fourteen lines.

[fol. 339] Page 187—in addition to designation of appellant, the balance of said page except the last five lines.

Page 193—balance of the page, beginning with the first question, line 8.

Page 232—in addition to appellant's designation remaining portion of this page.

Page 233—all of this page.

Page 234—first two lines.

Page 246—exceptions of appellant.

Pages 247, 248, 249, 250, and 251—exceptions of appellee.

Dated April 9, 1945.

J. A. Anderson, State Highway Commissioner of Virginia, Appellee, by Abram S. Staples, Attorney General of Virginia and Counsel for Appellee.

Service of the foregoing statement of designation of additional parts of the record the appellee thinks necessary for the consideration of the assignments of error relied on by the appellant is hereby accepted, and the receipt of a copy thereof is hereby acknowledged for and on behalf of the appellant this 10th day of April, 1945.

Bernard B. Bailey.

[fol. 339½] [File endorsement omitted.]

[fol. 340] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—April 30, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits, and the case is transferred to the summary docket. The Court desires to hear oral argument only upon the questions whether this

Court has jurisdiction of the case, and whether appellant was denied interest upon his condemnation award in violation of the Fourteenth Amendment.

Endorsed on cover: File No. 49,534. Virginia, Supreme Court of Appeals. Term No. 49. Bernard B. Bailey, Appellant, vs. J. A. Anderson, State Highway Commissioner of Virginia. Filed March 26, 1945. Term No. 49, O. T., 1945.